

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
RAFAEL LOPEZ-ONTIVEROS  
Defendant.

Case No.: 15-cr-575-GPC-1

**ORDER DENYING MOTION FOR  
RECONSIDERATION**

**[ECF No. 428.]**

Before the Court is Defendant Rafael Lopez-Ontiveros's motion for reconsideration of the Court's denial of his motion to reduce sentence under 18 U.S.C. § 3582(c). ECF No. 428. The Government has filed an opposition. ECF No. 430. For the reasons that follow, Lopez-Ontiveros's motion for reconsideration is **DENIED**.

**I. BACKGROUND**

On August 17, 2020, Lopez-Ontiveros filed a motion to reduce his sentence, arguing that a sentence reduction is warranted given the threat posed by the COVID-19 pandemic. ECF No. 413. Lopez-Ontiveros had already been infected with COVID-19, and he argued that his medical conditions put him at increased risk of severe effects were he to contract the illness again, particularly because he had not fully recovered. *Id.* On October 6, 2020, this Court issued an order denying Lopez-Ontiveros's motion. ECF No. 426. The Court found that although Lopez-Ontiveros had demonstrated he was at some

1 risk of reinfection with a serious case of COVID-19, reduction of his sentence would not  
 2 be consistent with the 18 U.S.C. § 3553 sentencing factors and Lopez-Ontiveros had not  
 3 established he would not present a danger to the public upon his release. ECF No. 426.

## 4 **II. DISCUSSION**

5 The Federal Rules of Criminal Procedure do not explicitly provide for motions for  
 6 reconsideration. However, the Ninth Circuit has stated that “post-judgment motions for  
 7 reconsideration may be filed in criminal cases.” *See United States v. Martin*, 226 F.3d  
 8 1042, 1047 n.7 (9th Cir. 2000). District courts have generally reviewed such motions  
 9 under the standard set forth in Federal Rules of Civil Procedure 59(e) and 60(b). *See*  
 10 *United States v. Mendez*, No. CR-07-00011 MMM, 2008 WL 2561962, at \*2 (C.D. Cal.  
 11 June 25, 2008); *United States v. Amezcua*, No. 1:93-CR-5046-AWI-1, 2015 WL  
 12 5165235, at \*1 (E.D. Cal. Sept. 2, 2015), *aff’d*, 670 F. App’x 454 (9th Cir. 2016).

13 A motion under Rule 59(e) “should not be granted, absent highly unusual  
 14 circumstances, unless the district court is presented with newly discovered evidence,  
 15 committed clear error, or if there is an intervening change in the controlling law.” *Herbst*  
 16 *v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001) (quoting *McDowell v. Calderon*, 197 F.3d  
 17 1253, 1255 (9th Cir.1999)); *see also Nunes v. Ashcroft*, 375 F.3d 805, 807 (9th Cir.  
 18 2004). Similarly, under Rule 60, a motion for “relief from a final judgment order or  
 19 proceeding” may be granted in the case of: (1) mistake, inadvertence, surprise, or  
 20 excusable neglect; (2) newly discovered evidence; or (3) fraud; or if (4) the judgment is  
 21 void; (5) the judgment has been satisfied; or (6) for any other reason that justifies relief.  
 22 Fed. R. Civ. P. 60(b). Whether or not to grant reconsideration is left to the sound  
 23 discretion of the district court. *United States v. Bailey*, No. 3:13-CR-30460CAB-1, 2016  
 24 WL 10675909, at \* 1 (S.D. Cal Oct. 25, 2016) (citing *Nation v. Norris*, 331 F.3d 1041,  
 25 1046 (9th Cir. 2003)). This District’s Civil Local Rules also provide guidance on  
 26 motions for reconsideration, requiring the party seeking reconsideration to indicate “what  
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1 new or different facts and circumstances are claimed to exist which did not exist, or were  
 2 not shown, upon such prior application.” Civ. L.R. 7.1(i)(1).

3 Lopez-Ontiveros moves to reconsider the Court’s order denying a reduction of his  
 4 sentence. Section 3582(c)(1)(A) permits a sentence reduction only upon a showing of  
 5 “extraordinary and compelling reasons,” and only if “such a reduction is consistent with  
 6 applicable policy statements issued by the Sentencing Commission.” Section 1B1.13 of  
 7 the Sentencing Guidelines further explains that a sentence reduction under 18 U.S.C. §  
 8 3582(c)(1)(A) may be ordered where a court determines, “after considering the factors set  
 9 forth in 18 U.S.C. § 3553(a),” that:

10 (1) (A) Extraordinary and compelling reasons warrant the reduction;

11 . . .

12 (2) The defendant is not a danger to the safety of any other person or to the  
 13 community, as provided in 18 U.S.C. § 3142(g); and

14 (3) The reduction is consistent with this policy statement.

15 In the instant motion, Lopez-Ontiveros argues the Court erred in finding that he  
 16 would pose a danger to the community if released and that reducing his sentence to time-  
 17 served would not adequately reflect the seriousness of the offense, promote respect for  
 18 the law, or provide just punishment. Lopez-Ontiveros also reiterates the conditions of  
 19 confinement at FCI Lompoc that he states place him at increased risk for being reinfected  
 20 with COVID-19 and suffering serious complications. The Court notes that these  
 21 contentions were available to Lopez-Ontiveros at the time he submitted his initial motion,  
 22 and most were before the Court when it considered his initial motion for reduction of  
 23 sentence; with regard to Lopez-Ontiveros’s arguments that he is at risk of reinfection, the  
 24 Court indeed found in its previous order that he was at some risk. *See* ECF No. 426. The  
 25 Court therefore finds that the motion does not meet the standards for reconsideration as  
 26 reflected in Rule 59(e), Rule 60(b), or Civil Local Rule 7.1(i)(1), as it fails to identify  
 27 new facts or arguments or point to clear error by the Court. In any case, the Court finds  
 28

1 Lopez-Ontiveros has not made a showing that he is entitled to a reduction in his sentence  
2 based on the information included in his motion for reconsideration.

3 **A. Danger to the Community**

4 Lopez-Ontiveros argues that his rehabilitation while in prison, as evidenced by his  
5 completion of almost three dozen vocational, training, and substance abuse programs  
6 during prison as well as his strong performance in various jobs while incarcerated,  
7 indicate that he no longer poses a danger to the community. ECF No. 428 at 4; ECF No.  
8 435-1 at 10, 18. He also points to the non-violent nature of his underlying offense and  
9 his criminal history. *Id.* The Government counters that despite the non-violent nature of  
10 Lopez-Ontiveros's underlying offense and criminal history, considerations of public  
11 safety are not limited to whether the defendant presents a direct threat of violence, but  
12 rather can extend to the dangers posed by drug trafficking. ECF No. 430 at 3 (quoting  
13 *United States v. Aileman*, 165 F.R.D. 517, 596 (N.D. Cal. 1996).

14 The Court commends the efforts Lopez-Ontiveros has made towards rehabilitation  
15 while in custody and appreciates that he has significant family support and a genuine  
16 desire to be there for his children. However, consistent with its previous order, the Court  
17 finds that Lopez-Ontiveros has not shown that he would not pose a danger to the  
18 community if released. At Lopez-Ontiveros's sentencing, the Court found that he had a  
19 supervisory role in the drug trafficking organization and obtained large amounts of  
20 methamphetamine imported from Mexico, which was ultimately distributed through at  
21 least one other individual working under Lopez-Ontiveros. ECF No. 358 at 6, 8, 21.  
22 Although his underlying offense was non-violent, district courts have denied  
23 compassionate release when the defendant had a leadership role in or a history  
24 participating in drug trafficking schemes, citing concerns about public safety. *E.g.*,  
25 *United States v. Sandoval*, No. CR14-5104RBL, 2020 WL 3077152, at \*6 (W.D. Wa.  
26 June 10, 2020) (denying compassionate release because defendant "lead a drug  
27 trafficking organization" and "[n]othing about the COVID-19 pandemic reduces the  
28

1 danger of drugs”); *United States v. Legaspi*, No. 19-cr-1671-2-L, 2020 WL 5642748, at  
2 \*4 (S.D. Cal. Sep. 22, 2020) (“The Court finds that Defendant’s drug addiction, criminal  
3 history, and inability to successfully complete terms of parole or probation indicate that,  
4 despite his new sobriety in custody, he would be a danger to others if the Court was to  
5 grant his motion for compassionate release.”). The Court agrees with this approach. The  
6 sentencing guidelines indicate that courts should look to 18 U.S.C. § 3142(g) for  
7 guidance in determining whether the defendant poses a danger to the safety of any other  
8 person or the community or to the community. U.S.S.G. 1B1.13(2). Section 3142(g) sets  
9 out a number of factors for a court to consider when evaluating its ability to assure the  
10 safety of other people and the community, including “the nature and circumstances of the  
11 offense charged, including whether the offense . . . involves . . . a controlled substance[.]”  
12 18 U.S.C. § 3142(g)(1). The defendant’s personal background and criminal history are  
13 also relevant, and Section 3142(g) does not suggest that only a history of violence can  
14 support a court’s conclusion that the safety of the community would be at risk. 18 U.S.C.  
15 § 3142(g)(3). Thus, although the violence or non-violence of the underlying offense is  
16 relevant, 18 U.S.C. § 3142(g)(1), it is not dispositive to the court’s determination.

17 Ultimately, the Court finds that Lopez-Ontiveros’s repeated involvement in drug  
18 trafficking and history of supervised release violations demonstrate that Lopez-Ontiveros  
19 still presents a danger to the community and accordingly, weigh heavily against his  
20 release.

## 21 **B. Sentencing factors**

22 The Court must take into account the sentencing factors set forth in 18 U.S.C. §  
23 3353(a) before determining that a reduction in sentence is warranted. 18 U.S.C. §  
24 3582(c)(1)(A). These factors include, among other things, the history and characteristics  
25 of the defendant; the need for the sentence imposed to reflect the seriousness of the  
26 offense; and the need to avoid unwarranted sentence disparities among defendants with  
27 similar records who have been found guilty of similar conduct. 18 U.S.C. § 3553(a).

1 Lopez-Ontiveros argues that a sentence of time served, which amounts to  
2 approximately 80 months with good time credits included, is appropriate for his offense  
3 in light of these sentencing factors. ECF No. 428 at 5. He argues that a sentence of 80  
4 months would be similar to the sentences imposed on most other members of the same  
5 drug-trafficking conspiracy. *Id.* The Government argues that Lopez-Ontiveros has not  
6 served a meaningful portion of his sentence and reducing his sentence to time served  
7 would not reflect the seriousness of the offense. ECF No. 430 at 2.

8 The Court agrees with the Government and finds that reducing Lopez-Ontiveros's  
9 sentence to the approximately 80 months served with good time credits would not reflect  
10 the seriousness of the offense and would create an unwarranted sentencing disparity  
11 between similarly-situated defendants. At Lopez-Ontiveros's sentencing hearing, the  
12 Court noted that Lopez-Ontiveros's offense was "extremely serious," particularly given  
13 his continued involvement with drug trafficking. ECF No. 358 at 22. Although Lopez-  
14 Ontiveros's co-defendants received lower sentences (with exception of co-defendant  
15 Margarito Ontiveros), given the large quantity of drugs Lopez-Ontiveros was found to  
16 have distributed, the longevity of his involvement in the drug trafficking scheme, and the  
17 supervisory role he undertook in the scheme, the Court explicitly recognized Lopez-  
18 Ontiveros was not similarly situated to his co-defendants and "warrant[ed] the greatest  
19 sentence of all of the defendants." *Id.* at 25. Section 3353(a) also does not limit the  
20 Court to considering only the potential disparity between co-defendants, but between all  
21 similarly-situated defendants who engaged in similar conduct. 18 U.S.C. 3553(a)(6).  
22 Lopez-Ontiveros already received a variance from the sentencing guideline range of 262  
23 months, indicating that a further reduction would create a significant disparity with  
24 similarly situated defendants in other cases. Further, the Court notes that it already  
25 considered a number of the arguments regarding his rehabilitation that Lopez-Ontiveros  
26 raises here when it imposed the original sentence. *See* ECF No. 358 at 10, 23–24.

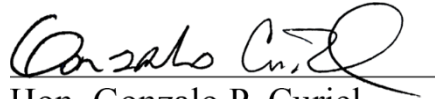
1 Accordingly, the Court finds that Lopez-Ontiveros has not shown in his motion for  
2 reconsideration that a reduction in his sentence would be consistent with the sentencing  
3 factors in Section 3353(a).

4 **III. CONCLUSION**

5 For the reasons set forth above, the Motion for Reconsideration is **DENIED**.

6 **IT IS SO ORDERED.**

7 Dated: January 19, 2021

8   
9 Hon. Gonzalo P. Curiel  
United States District Judge